United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-7212
77-7223

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7212
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UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

LEONARD DESSER, MELVIN DESSER and JACOB LANDESMAN,
Plaintiffs-Appellees-Appellants,

— against —

ROY A. ASHTON,
Defendant-Appellant-Appellee,

— and —

JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.
Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS

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TABLE OF CONTENTS

	PAGE
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	
INTRODUCTORY STATEMENT	i
REPLY STATEMENT OF FACTS	1
REPLY ARGUMENT	6
I. THE COURT DID NOT ERR IN REFUSING TO DISMISS (A) THE PENDENT CLAIMS MID-TRIAL, OR (B) THE FEDERAL CLAIM SOLELY FOR WANT OF A WRITTEN AGREEMENT	6
A. The Court Properly Retained The Pendent Claim	6
B. The Complaint Stated A Claim For Fraud In Connection With An Agreement To Purchase Securities	12
II. THE STATUTE OF FRAUDS DOES NOT BAR PLAINTIFFS' RECOVERY OF DAMAGES IN QUANTUM MERUIT, THE MEASURE OF WHICH IS A REASONABLE FINDER'S FEE	21
A. The Measure Of Damages Utilized Below Was Appropriate	21
B. In Any Event, The Writings Satisfy The Statute	25
III. THE JUNE 20 AGREEMENT, LIMITED TO ONE COMPANY AND ONE INVESTMENT SITUATION, WAS NOT AN UNREASONABLE RESTRAINT OF TRADE	29
IV. (IN SUPPORT OF PLAINTIFFS' CROSS-APPEAL) THE COURT ERRED IN DISMISSING THE FIRST AND FOURTH CAUSES OF ACTION	32
A. The First Cause Of Action	32
B. The Fourth Cause Of Action	32
CONCLUSION	33

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

PAGE(S)

A.T. Brod & Co. v. Perlow,
375 F.2d 393 (2nd Cir. 1967) 14

Abrams v. Carrier Corp.,
434 F.2d 1232 (2nd Cir. 1970) 11

Ashton v. Thornley Realty Co.,
346 F.Supp. 1294 (S.D.N.Y. 1972),
aff'd, 471 F.2d 692 (2nd Cir. 1973) 17

Bache & Co., Inc. v. Roland,
375 F.Supp. 989 (S.D.N.Y. 1974) 11

Benton v. Kennedy-Van Saun
Mfg. & Eng. Corporation,
2 A.D.2d 27, 152 N.Y.S.2d 955 (1st Dept. 1956) 32

Bialostad v. Wolfer,
191 Misc. 385, 77 N.Y.S.2d
222 (Sup. Ct. 1947) 23

Big Top Stores Inc. v. Ardsley Toy Shoppe, Ltd.,
84 Misc.2d 894, 315 N.Y.S.2d 897
(Sup. Ct. West. Co. 1970) 30

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 17

Bradford v. New York Times,
501 F.2d 51 (2nd Cir. 1974) 31

Calderone Enterprises Corporation
v. United Artists Theatre Circuit, Inc.,
454 F.2d 1292 (2nd Cir. 1971) 11

PAGE(S)

Channel Master Corp. v. Aluminum Ltd. Sales, Inc.,
4 N.Y.2d 403, 176 N.Y.S.2d 259 (1958) 13

Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y.
48, 110 N.E.2d 551 (1953) 27

Dasho v. Susqeuhanna Corp.,
380 F.2d 262 (7th Cir.), cert.
denied, 389 U.S. 977 (1967) 14

Dopp v. Franklin National Bank,
461 F.2d 873 (2nd Cir. 1972) 18

Duplan Corp. v. Iroquois Industries, Inc.,
[1967-1969 Transfer Binder] CCH Fed.
Sec. L. Rep. ¶ 92,318 (N.D.N.Y. 1968) 17

Flammia v. Mite Corporation,
E.D.N.Y., 73 Civ. 1571, decision
dated 7/14/76, aff'd, 76-7408 (2nd Cir. 1976) 23, 24, 25, 26, 27

Gelder Medical Group v. Webber,
_____N.Y.2d _____(N.Y.L.J. 5/19/77) 31

Gem Corrugated Box Corporation v.
National Kraft Container Corporation,
427 F.2d 499 (2nd Cir. 1970) 9

Goodman v. H. Hentz & Co.,
265 F.Supp. 440 (N.D. Ill. 1967) 14

Grattan v. Societa Per Azioni
Cotonificia Cantoni,
2 Misc.2d 861, 151 N.Y.S.2d 875
(Sup. Ct. N.Y. Co. 1956) 24

PAGE(S)

Herpich v. Wallace,
430 F.2d 792 (5th Cir. 1970) 16

Heyman v. Commerce & Industry Insurance,
524 F.2d 1317 (2nd Cir. 1975) 20

Hunt Foods & Industries, Inc. v. Doliner,
26 A.D.2d 41, 270 N.Y.S.2d 937
(1st Dept. 1966) 20

Ingenito Co. v. Bermac Co.,
376 F.Supp. 1154 (S.D.N.Y. 1974) 18

Intercontinental Planning
Ltd. v. Daystrom, Inc.,
24 N.Y.2d 372, 300 N.Y.S.2d 817 (1969) 27, 28

Iroquois Industries, Inc. v.
Syracuse China Corp.,
417 F.2d 963 (2nd Cir. 1969),
cert. denied, 399 U.S. 909 (1970) 11

Kardon v. National Gypsum Co.,
69 F.Supp. 512 (E.D.Pa. 1946) 15

Karpinski v. Ingrasci,
28 N.Y.2d 45, 320 N.Y.S.2d 1 (1971) 30

Kavit v. A.L. Stamm & Co.,
491 F.2d 1176 (2nd Cir. 1974) 10, 11

Landlow-Luzier Company v. Grey,
34 Misc.2d 1061, 232 N.Y.S.2d 247
(Sup. Ct. N.Y. Co. 1962) 24

Larido Corp. v. Crusader Manufacturing Co.,
4 Misc.2d 231, 155 N.Y.S.2d 715 (Sup Ct.
N.Y. Co. 1956) 31

PAGE(S)

McCormack Motor Sales v. Hayes,
42 A.D.2d 788, 346 N.Y.S.2d 460
(2nd Dept. 1973) 20

Minichiello v. Royal Business Funds Co.,
18 N.Y.2d 521, 223 N.E.2d 793, 277 N.Y.S.2d
268 (1966) 28

Morris Cohon & Company v. Russell,
23 N.Y.2d 569, 245 N.E.2d 719,
297 N.Y.S.2d 947 (1969) 28

Naimoli v. Massa,
81 Misc.2d 431, 336 N.Y.S.2d
573 (City Ct. Geneva 1975) 25

Opper v. Hancock Securities Corporation,
250 F.Supp. 668 (S.D.N.Y. 1966),
aff'd, 367 F.2d 157 (2nd Cir. 1967) 14

Paramount Pad Co. v. Baumrind,
4 N.Y.2d 393, 175 N.Y.S.2d 809 (1958) 31

Parrent v. Mid-West Rug Mills, Inc.,
455 F.2d 123 (7th Cir. 1972) 8

Pepsico, Inc. v. W.R. Grace & Co.,
307 F.Supp. 713 (S.D.N.Y. 1969) . . . . . 14 - 15

Richardson v. MacArthur,
451 F.2d 35 (10th Cir. 1971) 16

Robert v. Champion International Inc.,
52 A.D.2d 773, 382 N.Y.S.2d 790 (1st Dept. 1976) 29

PAGE(S)

Rollins v. Frank Cooper Associates,
19 A.D.2d 242, 241 N.Y.S.2d 259 (1st Dept. 1963), rev'd on other grounds, 14 N.Y.2d 913, 252 N.Y.S.2d 318 (1964) 25

Ryan v. J. Walter Thompson Company,
453 F.2d 444 (2nd Cir. 1971) 9

Seckendorff v. Halsey, Stuart & Co., Inc.,
259 N.Y, 353, 182 N.E. 14 (1932) 24

Service Systems Corp. v. Harris,
41 A.D.2d 20, 341 N.Y.S.2d 702 (4th Dept. 1973) 29, 31

Simon v. Electrospace Corporation,
28 N.Y.2d 136, 320 N.Y.S.2d 225 (1971) 24

Smith v. Kirkpatrick,
305 N.Y. 66, 111 N.E.2d 209 (1953) 24

Stockwell v. Reynolds & Co.,
252 F.Supp. 215 (S.D.N.Y. 1965) 14

Superintendent of Insurance v. Bankers Life Casualty Company,
404 U.S. 6 (1971) 13

Thomas v. Van DeMaele,
21 A.D.2d 396, 250 N.Y.S.2d 722 (1st Dept. 1964) 21

Towers v. Doroshaw,
159 N.Y.S.2d 367 (Sup. Ct. 1957) 23

Transit Advertisers v. New York, New Haven & H. R. Co.,
344 U.S. 817 (1952) 27

PAGE(S)

Tully v. Mott Supermarkets, Inc.,
540 F.2d 187 (3rd Cir. 1976) . . . . . 9 - 10

Tulp v. Padula,
70 Misc.2d 306, 333 N.Y.S.2d
3 (Civ. Ct. Bx. Co. 1972) 20

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 7

USAmchem, Inc. v. Goldstein,
512 F.2d 163 (2nd Cir. 1975) 31

Varney v. Ditmars,
217 N.Y. 223, 11 N.E. 822 (1916) 22

Waltzer v. Billera,
[1973 Tranfer Binder] CCH Fed. Sec.
L. Rep. ¶ 94,011 (S.D.N.Y. 1973) 8

Warshaw v. Hassid,
41 A.D.2d 652, 340 N.Y.S.2d
666 (2nd Dept. 1973) 21

Yanitz v. Benware,
376 F.2d 197 (2nd Cir. 1967),
cert. denied, 389 U.S. 874 (1967) 11

STATUTES

15 U.S.C. § 78(j) . . . . . 12 et seq.

New York General Business Law § 340 . . . . . 29 et seq.

New York Uniform Commercial Code §8-319 . . . . . 12 et seq.

OTHER AUTHORITIES

L. Loss, 3 Securities Regulation 1473 (2nd Ed. 1961) . . . . . 12 - 13

N.Y. Jur., Restitution & Implied Contracts 25

INTRODUCTORY STATEMENT

Defendant-appellant-appellee, Roy A. Ashton ("Ashton"), and defendants-appellants (collectively "defendants") raise issues upon this appeal which have recently been decided by this Court,* in each instance contrary to the position now asserted by defendants.

(1) In Flammia v. Mite Corporation, E.D.N.Y., 73 Civ. 1571, decision dated 7/14/76, aff'd without opinion, 76-7408 (2nd Cir. 1976), this Court, affirming the District Court judgment, held that: (a) writings, far less conclusive than those presented at bar, satisfied the Statute of Frauds; (b) an appropriate measure of damages for a quantum meruit recovery for services rendered in connection with an acquisition was a reasonable finder's fee, as determined at bar.

(2) In Bradford v. New York Times, 501 F.2d 51 (2nd Cir. 1974), this Circuit held that a restrictive covenant in an employment agreement, going far beyond the limited provision of the June 20 Agreement attacked at bar, did not violate New York General Business Law § 340.

(3) In Gem Corrugated Box Corporation v. National Kraft Container Corporation, 427 F.2d 499 (2nd Cir. 1970), this

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* The first decision referred to, almost identical to the facts at bar, is virtually ignored by defendants. The other two decisions referred to here are not even mentioned by defendants.

Court held that pendant jurisdiction was properly exercised where the federal claims were dismissed by stipulation pre-trial, whereas at bar dismissal occurred after three days of trial.

As discussed below, defendants fail to raise issues warranting disturbance of the judgment below.

REPLY STATEMENT OF FACTS

Defendants, lapsing from their own admonition (Br. p. 11), persistently misstate the evidence adduced below, relying heavily upon testimony not credited by the Court while ignoring wholesale the Court's findings of fact to the extent these depart from defendants' carefully tailored narrative.

Perhaps most incredible is defendants' statement that "The Court consistently accepted defendants' version of the facts and disbelieved plaintiffs' testimony" (Deft. Br. p. 29). Not only is this contradicted by the Court's holding of Ashton liable on the third cause of action, but it is also inaccurate. Inter alia, the Court rejected defendants' claims: (a) that Ashton was induced by fraudulent representations to enter the June 20 Agreement (A. 127), (b) that the agreement lacked consideration, and (c) that the June 20 Agreement violated New York's Donnelly Act (A. 145) -- the three central defenses.

The principal remaining inaccuracies are discussed below seriatim.

1. Events Preceding June 20

Defendants claim the Dessers lacked authority to reveal information about Transign (Br. p. 13) and hence their effort to find financing was in breach of their obligation to Youngblood. This is belied by the fact that on May 16, 1966, prior to the Dessers' first contact with Landesman, Youngblood stated he would sell to the Dessers if they could arrange financing for a $2 million cash deal (A. 121, T. 215, 287, 719). Obviously, Youngblood thereby authorized disclosure by the Dessers; disclosure was inevitable in

in any attempt to find financing.

The statement that Melvin Desser "disclosed the name and financial information about the company [to potential financers] without obtaining any oral or written agreement to keep the information confidential" (Br. p. 14) is unsupported by defendants' record citations. At page 390, Desser testified that he did not reveal Transign's name. At page 455, he testified the name was revealed to one individual with Youngblood's express consent.

Finally, defendants' claim the Dessers had no agreement with Youngblood for the purchase of Transign (Br. p. 13) is disproven by the record (T. 215, 287, 719).

2. The June 20, 1966 Meeting

Defendants argue that on June 20 the Dessers misled Ashton as to their authority to act for Transign (Br. p. 15). The contention was specifically rejected below (A. 124-7, 139). The Court also disbelieved that the June 20 Agreement was signed by Ashton in reliance upon false representations. (Compare Deft. Br. p. 15 with the decision below at A. 125-7, 139).*

Further, defendants conveniently ignore that prior to Ashton's execution of the June 20 Agreement the Dessers refused to identify the company (A, 124-7; T. 234, 539), demonstrating their preservation of Youngblood's confidences.

3. The Detroit Meeting

Defendants again argue that Youngblood's claimed ignor-

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* Defendants do not even cite Ashton's testimony to support the reliance claim.

ance of Ashton's identity, when introduced to him in Detroit as a British-American representative, is credible (Br. p. 17). The testimony is contra (T. 398-9; T. 269), as is the fact that the letter of intent, prepared by Ashton for Youngblood's signature, identified British-American as a purchaser and provided for signature by Ashton on its behalf (A. 105).

Defendants' claim that Ashton, in describing the Dessers' alleged fraud during the late night meeting in Detroit, never advised Youngblood of the June 20 Agreement is illogical. One fact, tending to support the claim of deception, would necessarily have been the Agreement itself. It is therefore inconceivable that Ashton would not have mentioned the Agreement.

Defendants err in stating that when the Dessers departed Detroit, Youngblood refused to enter a contract "absent a detailed agreement (Youngblood, T.M. 784-785), and Melvin Desser was not prepared to sign an agreement because, among other reasons, he did not have the financing . . . (. . . T.M. 892)" (Br. p. 19). The record shows Youngblood was prepared to sign, but Desser preferred to send him a clean copy of the agreement (T. 492, 278, 414, 416).

4. British-American Negotiations

Defendants state: "Ashton did not approach Youngblood or negotiate with Youngblood until after Leonard Desser had expressed a willingness to accept a finder's fee" (Br. p. 21). In fact, Ashton commenced negotiations the very night the Dessers left Detroit (e.g., T. 734); negotiations continued thereafter, although the Dessers did not agree to accept a finder's fee until late August

(See Ptf. Br. pp. 19-21).*

5. The Dessers' Alleged Inability To Finance A Purchase.

Defendants argue the Dessers were unable to obtain financing, inferring that no real opportunity was snatched from them (Br. p. 23). In fact, interest was evidenced by several entities (T. 345, T. 284),** but no deal concluded because Ashton successfully persuaded Youngblood to deal the Dessers out despite the June 20 Agreement (T. 345, 284).

6. Breakdown Of British-American Negotiations; Ashton's Subsequent Efforts.

Defendants contend the British-American acquisition did not break down because of Ashton's double-dealing (Br. p. 24), but offer no other explanation for the precipitous break-off. The facts remain that Ashton consulted with Coenen and Miller in August, 1966 (T. 664, 676-8)*** (while the British-American deal was proceeding); in October, Ashton was terminated by British-American and almost simultaneously retained by Youngblood for no other purpose than to find a purchaser for Transign (T. 604, 611, 675).

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* Leonard Desser testified that Davidson contacted him to urge acceptance of a finder's fee at a time when Youngblood had already committed to proceed with British-American and without the Dessers (T. 284).

** Defendants' record citations prove the contrary. Compare Deft. Br. p. 23 (point (f)) with T. 284, 344-5.

*** Defendants claim the conversations were in furtherance of the British-American acquisition (Br. p. 25), but are totally unable to cite record support.

Although Ashton claims that in all but one prospective sale he had no interest (Br. p. 26), there is no proof the other prospects evidenced other than passing interest (T. 671 et seq.). The Court found the acquisition by Trans-Industries "was part of a continuing course of conduct all directed to the same final object" -- i.e., Ashton acquisition without Desser participation (A. 142).

7. The Desser's Right To Participate

Defendants contend Youngblood was entitled to sell Transign without the Dessers "in view of their [the Dessers'] misrepresentations . . . " (Br. p. 26); defendants forget that Ashton was barred by contract from doing so (Ptf. Ex. 1) and that the Court found no misrepresentations occurred.

8. The Trans-Industries Acquisition

Ashton infers that the result of his participation in the Trans-Industries purchase of Transign was a "net loss" (Br. p. 28). The Court found that Ashton earned "considerable profit" (A. 13).*

9. Summary

Defendants do not refute the essential fact findings below. It is undenied that the Dessers were excluded from the Trans-Industries acquisition, that Ashton was precluded by written contract from making the acquisition without the Dessers, and that "Ashton breached his agreement with the Dessers when he made his initial approach to Youngblood; his acquisition of the company approximately a year later was part of a continuing course of conduct all directed toward the same final object" (A. 142).

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* The Court will recall that the shares acquired at minimal cost by Ashton were offered to the public at $5.25 (Ptf. Ex.8, p. 1). Ashton's stock purchases are described at A. 115.

REPLY ARGUMENT

I

THE COURT DID NOT ERR IN REFUSING TO DISMISS (A) THE PENDENT CLAIMS MID-TRIAL OR (B) THE FEDERAL CLAIM SOLELY FOR WANT OF A WRITTEN AGREEMENT.

A. The Court Properly Retained The Pendent Claims

Defendants argue that the Court should have dismissed the pendent claims when it dismissed the federal claims after three days of testimony.

The pre-trial chronology is relevant. In March, 1971 the District Court denied defendants' motion to dismiss the second amended complaint and held that the first two causes of action were legally sufficient under the federal securities laws (A. 1, document 19). Defendants did not seek to appeal the ruling. Thereafter, plaintiffs prosecuted the case with celerity. Procedural motions were determined by the Court (A. 1-4). Discovery was completed by both sides in 1974. A pre-trial order was entered in May, 1974 (A. 2). Six pre-trial conferences were held (A. 1-3).

On the eve of trial, one and one-half years after the pre-trial order was entered and four years after Judge Motley's ruling, defendants moved for summary judgment (A. 2, 72). That motion was denied, and three days of testimony taken. The Court then dismissed the federal claim, retaining the pendent claims in its discretion (A. 137). Plaintiffs have argued elsewhere (Ptf.

Br. Pt. I) that the dismissal was error; even assuming that it was not,* the Court plainly did not err in retaining the pendent claims.**

United Mine Workers, v. Gibbs, 383 U.S. 715 (1966), recognized that where state and federal claims derive from "a common nucleus of operative fact" (id. at 725) and:

> "[A] plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issue, there is power in federal courts to hear the whole" (id.)

The Court further held that it is only where the "federal claim is only an appendage" that the state claim may be dismissed (id. at 727).

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* If the dismissal was error, defendants' argument is, of course, moot. Defendants' argument that the complaint failed to state a claim is discussed infra, Point IB.

** Nor did the Court err in refusing to restrict plaintiffs' proof in the first instance to testimony concerning the June 20 meeting (Def. Br. p. 41). Plaintiffs' securities fraud claim rested upon proof of the occurrences prior to and during the June 20 meeting and upon proof of subsequent events, particularly as these subsequent events elucidated Ashton's fraudulent intent. Any such artificial limitation would have precluded plaintiffs from presenting the underlying facts and have fragmented the proof rendering it difficult, if not impossible, to comprehend the relevant chronology. The three days' testimony which preceded dismissal of the federal claim virtually all bore upon that claim.

At bar, the pendent claims were joined several years after the commencement of the action, when new counsel was retained, at a time when the federal claims had survived a motion to dismiss (A. 2). The state claims arise from the identical occurrence from which the federal claim arise. The testimony concerning the federal claim necessarily related to the state causes of action. Under no circumstances could the Securities Act claim be called an "appendage".

In Parrent v. Mid-West Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972), the Court wrote:

> "Certainly judicial economy directs that we dispose of the issues here instead of sending the case back to the district court with directions to dismiss Counts V and VI and virtually sending the plaintiffs to the state court where it is likely that the case would go through the trial and appellate courts. The parties would be greatly inconvenienced by having to retry the issues. It also would be unfair to the parties, who have litigated the issues in a three day trial in the district court and filed briefs and argued here, to have us refrain from disposing of Counts V and VI after passing on the judgment with respect to other counts, especially in view of the 'federal judicial resources' already committed." [Footnote omitted] Id., at 129

This view is followed in this District. For example, in Waltzer v. Billera, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,011 (S.D.N.Y, 1973), Judge Ryan found against the plaintiff on the federal securities claims on motion for summary judgment but nevertheless decided the pendent claims, stating:

> "The state and federal claims asserted by plaintiff arise from the same nucleus of operative facts and the federal claims pursuant to Section 10(b) of the Exchange Act and Rule 10(b)(5)

thereunder would have survived a pretrial motion to dismiss the complaint. Therefore, this Court has power to entertain plaintiff's state and federal claims and the discretion to entertain the state claim where after trial the federal claims have been dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 725-728 (1966). In the interests of judicial economy and convenience, it makes little sense to direct plaintiff to state court at this late stage." (Id. at 94,070).

In this Circuit pendent jurisdiction has repeatedly been exercised even where the federal claims have been dismissed prior to trial. See, Gem Corrugated Box Corporation v. National Kraft Container Corporation, 427 F.2d 499 (2nd Cir. 1970) (federal claims dismissed by stipulation prior to trial); Ryan v. J. Walter Thompson Company, 453 F.2d 444 (2nd Cir. 1971) (§10(b) claims dismissed on motion for summary judgment).

No case cited by defendants supports their claim that eight years after this action was commenced plaintiffs should be directed to the state court for a trial of the pendent claims (likely to be barred by the statute of limitations) nor the contention that in 1975, mid-trial, plaintiffs should have been so directed, when substantial testimony had already been taken as to the state claims.

In Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3rd Cir. 1976), the action was submitted to the District Court for resolution without trial and based solely upon the pleadings, depositions, interrogatories and proposed findings (Id. at 189). The Court held that the pendent claims should not have been de-

cided, where plaintiffs could obtain full adjudication of their state law claims in an already pending state court proceeding (Id. at 196). In so ruling, the Court wrote:

> "The substantiality of the federal claim is ordinarily determined on the basis of the pleadings." Id. at 196.

There, the Court found that dismissal of the federal claims on the pleadings was warranted. At bar, such dismissal was denied A. 1), as was summary judgment (A. 3). Substantial issues were presented, including whether U.C.C. § 8-319 was met by Ashton's pre-trial concessions.

In Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2nd Cir. 1974), the Court found its previous liberal decisions with respect to pendent jurisdiction* to be distinguishable because in Kavit the "state claims would have gone to arbitration . . . if they had stood alone". Id., at 1178. The Court wrote on point:

> "In none of those [liberal] decisions, however, did a federal trial involve any risk of loss of rights, beyond the possibility . . . that the federal court would misread state law. A quite different case is presented where, as here, dis-

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* As Kavit noted with respect to those decisions:

> "[T]he courts of appeals have given broad rein to district courts that have exercised pendent jurisdiction even where the federal claims have been disposed of before trial. See Gem Corrugated Box Corp. v. National Kraft Container Corp., 427 F.2d 499, 501 n.1 (2nd Cir. 1970) . . . " Id., at 1180, n. 5.

missal or a stay of the state claims would enable the defendant to have those claims determined by arbitration rather than by a court." Id. at 1179.

The Court went on to note that absent exceptional circumstances the Court should refrain from exercising pendent jurisdiction where the federal claims are subject to pre-trial dismissal. Such circumstances include, the Court held, the federal Court's prior investment of substantial time in the case, or situations where dismissal of pendent claims would disserve judicial economy, convenience and fairness to litigants, as for example, at bar where it would create statute of limitations problems.

Notwithstanding the strong prejudice to defendants' rights to arbitration, the Court in Kavit held that there was no error in refusing to dismiss the state claims. The Court noted defendants' failure to prosecute its appeal of the denial of a motion to dismiss or stay as relevant.*

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* The remaining cases cited by defendants are singularly inapposite. In Calderone Enterprises Corporation v. United Artists Theatre Circuit, Inc. 454 F.2d 1292 (2nd Cir. 1971), the federal claims were dismissed under Rule 12 promptly after commencement of the action. In Bache & Co., Inc. v. Roland, 375 F. Supp. 989 (S.D.N.Y. 1974), the Court declined to exercise pendent jurisdiction in an interpleader action where its sole involvement was limited to award of the interpleader fund on uncontested motion. In Yanitz v. Benware, 376 F.2d 197 (2nd Cir. 1967), cert. denied, 389 U.S. 874 (1967), Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2nd Cir. 1969), cert. denied, 399 U.S. 909 (1970), and Abrams v. Carrier Corp., 434 F.2d 1232 (2nd Cir. 1970) the federal claims were all dismissed in the early pleading stage.

Under all of the authority cited, even defendants' cases, there was no error in the refusal, mid-trial, to dismiss the pendent claims, where the sufficiency of the federal claims was twice affirmed before trial by the District Court -- especially when the result would be to deny plaintiffs the right, in any forum, to assert their claims.*

B. The Complaint Stated A Claim For Fraud In Connection With An Agreement To Purchase Securities.

Defendants urge that the complaint failed to state a claim because under § 10(b) only fraud in connection with a written contract, satisfying the Statute of Frauds, is actionable** (Br. p. 35). The well-reasoned decision below was contrary (A. 91).

1. A Contract Satisfying The Statute Is Unnecessary.

Professor Loss, in his authoritative treatise, reasoned that:

> "Just as not every breach of contract violates the rule [Rule 10b-5] it is equally true that there can be a violation of the

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* Additionally, even if the claims were not barred by the statute of limitations, the principal defendants are not presently subject to jurisdiction. Ashton resides out of this country and Youngblood in California.

** U.C.C. § 8-319 upon which defendants rely is narrowly limited in scope, affecting only a right to enforce a contract for the "sale" of securities.

> rule . . . without an enforceable contract." 3 Loss, Securities Regulation 1473 n. 102 (2d Ed. 1961).

Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 176 N.Y.S.2d 259 (1958), a leading New York State case, is precisely on point. There the Court held that the complaint alleging, defendant's fraud in entering into a contract (which fell within the Statute of Frauds), without intention to perform stated a valid cause of action, writing:

> "[O]ne who fraudulently misrepresents himself as intending to perform an agreement is subject to liability in tort whether the agreement is enforceable or not . . . . The policy of the statute of frauds is 'not directed at cases of dishonesty in making' a promise . . . never intended as an instrument to immunize fraudulent conduct, the statute may not be so employed." 4 N.Y.2d at 408 (citations omitted; emphasis in original).

Plaintiffs at bar, as in Channel Master, claim that Ashton fraudulently represented his intention to perform his agreement. As held in Channel Master, the Statute of Frauds is inapplicable to a § 10(b) fraud claim.

The term "purchase" is defined in Section 3(a)(13) of the Exchange Act as follows:

> "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire." (emphasis added)

The term "contract" in each of the above definitions is to be broadly construed to effectuate the remedial purposes of the Act. Superintendent of Insurance v. Bankers Life & Casualty

Company, 404 U.S. 6 (1971). As held in Dasho v. Susquehanna Corp. 380 F.2d 262 at 266 (7th Cir.), cert. denied, 389 U.S. 977 (1967):

> "Our attention is called to Sections 3(a)(13) and 3(a)(14) of the Exchange Act . . . This broad language indicates an intention by Congress that the words 'purchase' and 'sale' are not limited to transactions ordinarily governed by the commercial law of sales. The purpose is evidently to make control of securities transactions reasonably complete and effective to accomplish the purposes of the legislation." (emphasis added)

Indeed, the statutory language states that a purchase includes "any contract to buy, purchase or otherwise acquire." By this expansive language the drafts persons meant exactly what they said. Had they wished to limit actions to those based only on complete, written, enforceable contracts, they readily could have done so. They did not. All that is required is an apparent contract. The Court should not rewrite the statute with the effect of limiting the protection of the Federal securities acts.

There is no difference between an oral agreement and a written agreement for purposes of maintaining a Rule 10b-5 claim. A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2nd. Cir. 1967): Opper v. Hancock Securities Corporation, 250 F. Supp. 668 (S.D.N.Y. 1966), aff'd, 367 F.2d 157 (2nd Cir. 1967); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967); Stockwell v. Reynolds & Co., 252 F.Supp. 215 (S.D.N.Y. 1965).

Indeed, Pepsico, Inc. v. W.R. Grace & Co., 307 F.Supp. 713 (S.D.N.Y. 1969), the very decision relied upon by defendants

held that an oral agreement to purchase a security for $120 million was a valid contract within the meaning of Rule 10b-5.

In that action Judge Murphy dismissed the complaint only because:

> "Plaintiffs' affidavits in opposition to the motion contain no facts which spell out any fraud in connection with the "purchase by plaintiff of the Miller stock . . . " 307 F.2d at 720 (emphasis in original).

At bar, plaintiffs did allege and prove that there was an agreement to purchase a security and that Ashton committed a fraud in connection with the aborting of that agreement.

Section 29(b) of the Exchange Act further supports the proposition that oral agreements, even if unenforceable under the Statute of Frauds, create actionable Securities Act claims. That section provides that every contract in violation of the Act, or any rule or regulation promulgated thereunder, is void as regards the rights of any person who made or engaged in the performance of the contract in violation of the Act, rule or regulation. By its terms, § 29(b) contemplates private causes of action, inter alia, for damages in connection with such void agreements. See, Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D.Pa. 1946).

Moreover, when a contract to purchase or sell securities is aborted,* the issue of whether there was a securities fraud

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* Defendants have not denied that fraud in connection with an aborted agreement is actionable. See Ptf. Br. p. 30.

should be determined at trial, as the Court below held. As stated in Richardson v. MacArthur, 451 F.2d 35, at 40 (10 Cir. 1971):

> "In short, whether the failure to follow through on an agreement to purchase or sell stock is a mere breach of a contract or whether it amounts to a manipulative or deceptive device, or a contrivance in contravention of § 10(b) depends upon the facts and circumstances developed at trial." (footnote omitted)

Finally, there are numerous decisions holding that the federal securities law should be construed as broadly as possible to effectuate their remedial purposes. See, e.g., Herpich v. Wallace, 430 F.2d 792, at 802 (5th Cir. 1970). Based on this approach, the Court should seek to include any fraud committed in connection with the purchase and sale of a security, regardless of whether the underlying contract or agreement is the subject of defenses that might by valid in a state action.* Such approach will further the proper administration of the securities laws. **

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* Under Channel Master, the defense at bar would not in any event be valid in a state action.

** It should be noted that many dealings between a customer and broker will involve only oral agreements to purchase or sell. Defendants are incorrect that all such transactions are exempt from the writing requirement of the Statute of Frauds (see Deft. Br. p. 38, fn.). Rather, the Official Comment to U.C.C. § 8-319 indicates that ordinarily records of brokerage houses may not suffice to meet the Statute and that many such transactions will not be exempt from the Statute, as for example whenever the broker acts as a principal. The potential for fraud in this area is broad, and the ruling sought by defendants could eradicate any remedy under the federal statute for a broad class of defrauded customers whenever the broker-principal failed to maintain adequate records.

The cases relied upon by defendants are unpersuasive. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), concerned only whether the mere offeree of securities could maintain a cause of action under § 10(b). No requirement of a writing was implied by the Court, which was concerned only with claims relying solely upon oral proof (421 U.S. at 742), whereas at bar the written proof of an agreement is substantial.* Finally, the Court focused there upon impersonal potential transactions, where "privity of dealing or even personal contact between potential defendant and potential plaintiff" (421 U.S. at 745) was lacking. At bar, the parties dealt face-to-face.

In Duplan Corp. v. Iroquois Industries, Inc., [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,318 (N.D.N.Y. 1968), an agreement in principal was reached, but altered several times. The Court did not state the basis for its finding of fact that the agreement was not binding (¶ 92,318 at p. 97,490). The Court also found that no fraud had occurred, no damage had been suffered and interstate facilities were not utilized.

In Ashton v. Thornley Realty Co., 346 F.Supp. 1294 (S.D. N.Y. 1972), aff'd., 471 F.2d 692 (2nd Cir. 1973), the agreement

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* See 2, below. Further, the Court in Blue Chip indicated particular concern with oral proof of the effect of a deceptive practice upon a mere offeree.

by its terms provided that it would be without effect unless plaintiff purchaser secured the consent of the board of the corporate seller, which condition precedent did not occur. At bar no such condition precedent existed.*

In Ingenito Co. v. Bermec Corp., 376 F.Supp. 1154 (S.D. N.Y., 1974), the Court was concerned only with whether substitution of one cattle maintenance contract for another constituted a sale of securities. In holding that it did, the Court emphasized that the "securities laws should be construed with an eye to their remedial purpose" (376 F. Supp. at 1180). The Court expressed no opinion as to whether an agreement of purchase was required to meet Statute of Frauds requirements.

In Dopp v. Franklin National Bank, 461 F.2d 873 (2nd Cir. 1972), the Court did not rule that an oral agreement to purchase or sell was insufficient under §10(b), although an extensive analysis of the merits was made. The Court's limited comment on point was that the absence of a written agreement was one of several factors (461 F.2d at 879-80) casting doubt upon the existence (not validity) of an agreement. Implicit in the Court's decision is a recognition that an oral agreement would suffice, if proven, to support a §10(b) claim.

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* Indeed Ashton represented Board approval would be a matter of course (T. 254).

2. In Any Event, Plaintiffs Raised A Triable Issue As To Whether The Statute Of Frauds Was Satisfied.

U.C.C. §8-319, upon which defendants rely, provides in pertinent part:

> "A contract for the sale of securities is not enforceable by way of action or defense unless . . . (d) the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price."

In opposition to defendants' motion for summary judgment below plaintiffs contended, with appropriate transcriptural references, that Ashton admitted at deposition the existence of a contract sufficient to satisfy U.C.C. §8-319(d). Specifically, Ashton admitted a 35-65 split between the Dessers and British-American had been agreed to in principle with the latter advancing 65% of the capital, the Dessers the remainder (T. 535-7, 567).

Plaintiffs further argued below the following events and acts should be considered together in determining the existence of an agreement and the terms thereof: (i) the meeting on June 20, 1966; (ii) the execution of the June 20, 1966 Agreement; (iii) the conversations that took place among the Dessers and Ashton at that meeting both prior and subsequent to the execution of the letter agreement; (iv) the subsequent conversations between the Dessers and Ashton during July and August 1966, and (v) the August 31, 1966 agreement and the circumstances surrounding

its execution.*

Plaintiffs contended below that if all these events were a series, then plaintiffs could introduce evidence to supplement the written agreements, provided that such evidence was not inconsistent with or contradictory of the writings. U.C.C. §2-202(b); Hunt Foods and Industries, Inc. v. Doliner, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1st Dept. 1966); Tulp v. Padula, 70 Misc.2d 306, 333 N.Y.S.2d 3 (Civ. Ct. Bx. Co. 1972).

For example, the August 31, 1966 agreement (A. 109) specifically refers to the services rendered by the Dessers in "arranging for negotiations" between Ashton, British-American and Transign. Paragraph 4 thereof states that the finder's fee payable to the Dessers will be in lieu of all other claims and understandings whether oral or written between the Dessers and British-American and Ashton. It is obvious that this paragraph was added to include the percentage stock issuance previously agreed to by Ashton with the Dessers.

Plaintiffs further argued below that parol evidence would be admissable to elucidate the terms of the prior understanding, especially where, as in the case at bar, a fraud was involved in connection with the agreement. McCormack Motor Sales v. Hayes, 42 A.D.2d 788, 346 N.Y.S.2d 460 (2nd Dept. 1973);

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* This manner of grouping acts and conversations was predicated upon defendants' concession that all related to one transaction -- the acquisition of Transign. The Court later held that such relationship existed (A. 142).

Warshaw v. Hassid, 41 A.D.2d 652, 340 N.Y.S.2d 666 (2nd Dept. 1973); Thomas v. Van DeMaele, 21 A.D.2d 396, 250 N.Y.S.2d 772 (1st Dept. 1964).

Where plaintiffs offered proof that the Statute of Frauds was no bar, by reason of U.C.C. § 8-319(d), the Court below would have erred had it granted summary judgment; the Court properly permitted the matter to proceed to trial. See, Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2nd Cir. 1975).

II

THE STATUTE OF FRAUDS DOES NOT BAR PLAINTIFFS' RECOVERY OF DAMAGES IN QUANTUM MERUIT, THE MEASURE OF WHICH IS A REASONABLE FINDER'S FEE

A. The Measure Of Damages Utilized Below Was Appropriate.

Defendants argue, inconsistently (Br. Pts. II & IV), that the Court below (a) awarded plaintiffs a finder's fee, in derogation of the Statute of Frauds, and (b) that the measure of damages utilized in connection with Ashton's breach of the June 20 Agreement was improper. The defendants' contentions rest upon the false assumption that the Court was awarding damages for breach of a negative contract (see below). In fact, the decision below awarded quantum meruit recovery:*

* Plaintiffs amended at close of trial to assert such claim. Defendants raise no objection to the grant of the Rule 15 motion.

"The plaintiffs had a valid contract with Ashton. While that agreement, by its terms, did not call for Ashton to compensate the Dessers as finders per se, the agreement certainly did contemplate that the Dessers would have the opportunity to benefit from any action by Ashton resulting from the Dessers' performance of their part of the agreement, to wit, furnishing Ashton with the information he wanted about Transign.

"The Dessers did furnish this information which in turn led to Ashton being brought together with Youngblood. That contract eventually led to a deal for the purchase of Transign by Ashton, with others not including the Dessers, which was exactly the type of transaction to which the June 20 Agreement was addressed. Therefore, in this Court's view, the Dessers performed a service for Ashton in the nature of that usually performed by a finder, under circumstances which clearly implied Ashton's acknowledgement that if the service led to a purchase of Transign, Ashton would allow the Dessers to reap a benefit from it. Ashton breached this agreement and profited as a result. Accordingly, the plaintiffs should recover from him for the value of their services. In this case, the Court determines that such a recovery should be a reasonable finder's fee." (A. 156-7).*

In Varney v. Ditmars, 217 N.Y. 223, 231, 11 N.E. 822, 825 (1916), the Court of Appeals held:

"[I]n case one party to an alleged contract has performed in reliance upon the terms thereof, vague, indefinite and uncertain though they are . . . the law will presume a promise to pay the reasonable value of the services."

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* And (at A. 153), the Court specifically held:

"[T]hey [plaintiffs] have a right to recover based on quantum meruit for the services rendered to the defendants."

Thus, so long as the evidence shows, as the Court held it did here, the rendition of services under circumstances implying an agreement to pay therefor, recovery in quantum meruit may be had. Bialostad v. Wolfer, 191 Misc. 385, 77 N.Y.S.2d 222 (Sup. Ct. 1947); Towers v. Doroshaw, 159 N.Y.S.2d 367 (Sup. Ct. 1957).

Flammia v. Mite Corporation, E.D.N.Y. 73 Civ. 1571, decision dated 7/14/76, aff'd without opinion, 76-7408 (2nd Cir. 1976, is dispositive because of its factual similarity to the matter at bar. There, plaintiff had arranged the introduction of two companies by one of which he was formerly employed, with the expectation of an equity participation in the event of an acquisition. Plaintiff had also provided the prospective purchaser with certain financial information, much as the Dessers here provided financial data, prepared fiscal work-ups, etc. During negotiations plaintiff requested a finder's fee, which request was rejected. The acquisition ultimately was completed, but plaintiff was not offered an opportunity to participate. Plaintiff sued and was awarded recovery in quantum meruit.

The Court there declined to set damages as simply the reasonable value of plaintiff's services on an hourly basis. Rather, plaintiff was awarded the sum of $130,000 as compensation not only for services as finder (even though the underlying agreement was, as at bar, for employment and equity participation) but also in transmitting certain knowledge, including his former employee's availability for sale.

Implicit in the affirmance Flammia decision was approval of an award of quantum meruit, using a finder's fee as one benchmark of the value of plaintiff's services. See also, Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953); Landlow-Luzier Company v. Grey, 34 Misc.2d 1061, 232 N.Y.S.2d 247 (Sup. Ct. N.Y. Co. 1962); Grattan v. Societa Per Azioni Cotonificia Cantoni, 2 Misc.2d 861, 151 N.Y.S.2d 875 (Sup. Ct., N.Y.Co. 1956), all supporting an award of quantum meruit at bar.

The facts establish the propriety of the award below.* Defendants' argument that the Court applied an improper measure of damages relies entirely upon the faulty assumption (Br. p. 58 et seq.) that the measure of damages should have been that applicable to breach of a non-competition agreement.

However, such was not the basis of the award below. Rather, the Court held Ashton liable to pay plaintiffs the reasonable value of their services in introducing the parties, arranging the Detroit meeting, in negotiating the British-American acquisition, etc. because it implied a promise to pay, inter alia,

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* The fact that the ultimate acquisition took place some time after the introduction and in altered form and that plaintiffs were prevented from participating in the negotiations are of no consequence to the claim for quantum meruit. Simon v. Electrospace Corporation, 28 N.Y.2d 136, 320 N.Y.S.2d 225 (1971); Seckendorff v. Halsey, Stuart & Co., Inc. 259 N.Y. 353, 182 N.E. 14 (1932).

from the June 20 Agreement in which Ashton committed to allow plaintiffs an opportunity to benefit from the acquisition.* The cases cited by defendants are hence totally irrelevant as none of them denies that the measure of damages for quantum meruit was properly applied by the Court nor that quantum meruit recovery was proper.

B. In Any Event, The Writings Satisfy The Statute.

Obviously, the Statute of Frauds is irrelevant where a finder's fee is merely used as a benchmark for assessing quantum

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* As in Flammia, the Court below did not set the value of plaintiffs' services simply as a finder's fee. (Plaintiffs' expert testified that under the "Lehman Formula" such fee at bar would have been in the sum of $123,000 -- i.e., 5% on the first one million dollars, 4% on the second million dollars, 3% on the third million etc. -- (A. 164)). Rather, the Court evaluated plaintiffs' services, including the introduction, the trips to Detroit, their "integral" participation in the "abortive British-American transaction" (A. 170) and noted that Ashton, acting for British-American, and the Dessers at that time evaluated the Dessers' services at $100,000 (A. 170). The Court found that evaluation to be fair and awarded damages on that basis (A. 170).

Indeed, it may be that the recovery awarded was too grudging. For example, in Flammia the Court wrote that the "reasonable value" of services may be equated with "market value" and that the latter may be measured by the unjust enrichment. See also, 50 N.Y. Jur., Restitution and Implied Contracts, § 107; Rollins v. Frank Cooper Associates, 19 A.D.2d 242, 241, N.Y.S.2d 259 (1st Dept. 1963), rev'd on other grounds 14 N.Y.2d 913, 252 N.Y.S.2d 318 (1964); Naimoli v. Massa, 81 Misc.2d 431, 366 N.Y.S.2d 573 (City Ct., Geneva 1975). If unjust enrichment is the test, Ashton, a one-third owner of Transign, obtained a benefit in excess of $1 million (Ptf. Ex. 8).

meruit recovery. Even were the statute applicable, the Court below correctly ruled that the writings satisfy the requirements thereof.

The Court below held that the Statute was satisfied by reading the June 20 and August 31 agreements (A. 102 and A. 109) together*, writing:

> "As Judge Platt has written in a very similar case, such writings are sufficient.
>
> "' These communications . . . sufficiently identify the seller; identify and establish plaintiff's role in the negotiations; establish the subject matter of the transaction; and most important, acknowledge performance by and obligation to the plaintiff as a consequence of his assistance in arranging the sale . . . they are sufficient to support a claim for compensation under a theory of quantum meruit . . . . " (Flammia v. Mite Corporation, 401 F. Supp. 1121, 1133 (E.D.N.Y. 1975)).
>
> Indeed, here the documents go even farther than those presented in Flammia." (A. 167-8).

The Flammia Court found writings -- all referring to the acquisition and none obligating the purchaser or seller to pay a finder's fee -- to be sufficient. That holding was affirmed

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* The expert testified the June 20 Agreement was a "typical document used by a finder to protect his right to a fee (Tr. 49" (A. 165).

by this Court.*

There can be little doubt that the writings at bar "go further" than those in Flammia (A. 168).** The June 20 Agreement is signed by Ashton and acknowledges the subject matter of the transaction and plaintiffs' negotiating efforts to date. The August 31 Agreement acknowledges plaintiffs' performance in introducing the companies, in arranging meetings, and in negotiations (A. 109).

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* The affirmance in Flammia was necessarily with respect to the Statute of Frauds holding, as defendant-appellant there raised the holding with respect to the Statute as the principal error raised on appeal (see Brief for Defendant-Appellant, Flammia v. OSG Tap & Die, Inc., 76-7408 (2nd Cir.), at p. 17, et seq.)

** As the Court held in Flammia, 401 F. Supp. at 1133, writings sufficient to satisfy the Statute need not be contained in a single document. Separate documents suffice if connection of documents not signed by a party with those which are signed is demonstrated by internal reference or subject matter. See also, Transit Advertisers v. New York, New Haven & H. R. Co., 194 F.2d 90, (2nd Cir.), cert. denied, 344 U.S. 817 (1952); Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E.2d 551 (1953).

The August 31 Agreement, with its statement that it supercedes prior obligations and its identity of subject matter, clearly may be read with the June 20 Agreement under this doctrine. See, also, Intercontinental Planning, Inc. v. Daystrom, infra, to the same effect.

Morris Cohon & Company v. Russell, 23 N.Y.2d 569, 245 N.E.2d 719, 297 N.Y.S.2d 947 (1969), is instructive. There the Court severely limited Minichiello v. Royal Business Funds Co. 18 N.Y.2d 521, 223 N.E.2d 793, 277 N.Y.S.2d 268 (1966) on which defendants rely, holding that a writing, to suffice for imposition of liability in quantum meruit under the statute, "need only evidence the fact of plaintiff's employment by defendant to render the alleged services. The obligation . . . to pay reasonable compensation . . . is then implied." (emphasis added) 23 N.Y.2d at 575-6.

At bar, the June 20 Agreement clearly obligates Ashton to compensate the Dessers, either by way of a fee or participation, for their revelation of the identity of Transign. The August 31 Agreement more specifically details the Dessers' employment in connection therewith.

Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 300 N.Y.S.2d 817 (1969), cited by defendants, is inapposite. There, plaintiff sought a fee in connection with the acquisition of Daystrom by defendant Schlumberger. The letter relied upon by plaintiff was written two years earlier and referred to an entirely different acquisition by different parties. The Court held that an alleged oral modification of the letter agreement was not admissable to extend the obligation to cover an entirely new transaction, because "a fortiori the oral modification . . . also fails to comply with the Statute of Frauds." 24 N.Y.2d at 380. The parol evidence was also inadmissable be-

cause the letter was unambiquious. At bar, plaintiffs do not contend that an oral modification of the June 20 Agreement occurred, nor do they seek to create by subsequent documents an ambiguity in the June 20 Agreement or to cover a wholly new transaction.

In Robert v. Champion International, Inc., 52 A.D.2d 773, 382 N.Y.S.2d 790 (1st Dept. 1976), there was no question at all of the sufficiency of a writing. Rather, plaintiff relied solely on an alleged oral modification.

Plainly, if the Statute is held to apply, it is satisfied by the writings produced by plaintiffs.

III

THE JUNE 20 AGREEMENT, LIMITED TO ONE COMPANY AND ONE INVESTMENT SITUATION, WAS NOT AN UNREASONABLE RESTRAINT OF TRADE.

Ashton contends that the June 20 Agreement, limiting his right to deal with one investment situation and one company (A. 102) and leaving him free to deal with any other company, in any place, at any time, either personally or in a corporate capacity, unreasonably restrained his ability to earn a living in contravention of New York General Business Law § 340.

It must be remembered that by the June 20 Agreement the Dessers agreed to disclose certain confidential information in consideration for which they received Ashton's promise not to deal with Transign without them or without making appropriate provision for them. No absolute bar was imposed.

In Service Systems Corp. v. Harris, 41 A.D.2d 20, 341 N.Y.S.2d 702, at 705 (4th Dept. 1973), the Court listed five factors

to be considered with respect to enforcement of a restrictive covenant:

> "(1) the restriction must be necessary for the employer's protection; (2) the time must be reasonable; (3) the geographical area must be reasonable; (4) the burden on the employee must not be unreasonable; and (5) the general public must not be harmed." (citations omitted)

The June 20 Agreement was plainly required for the Dessers' protection; Ashton's ability to function in his then position or obtain employment in the future was not impaired one whit and certainly the general public was not harmed.

The fact that the June 20 Agreement is silent as to the duration is irrelevant. As the New York Court of Appeals held in Karpinski v. Ingrasci, 28 N.Y.2d 45, 320 N.Y.S.2d 1 (1971):

> "Nor may the [restrictive] covenant be declared invalid because it is unlimited as to time . . . a covenant will not be stricken merely because it 'contains no time limit or is expressly made unlimited as to time.'" (citations omitted)

In Karpinski the Court held that it was permitted to enforce a restrictive covenant to the extent reasonable.

When Ashton breached the June 20 Agreement slightly more than one year after execution by acquiring Transign as a principal without the Dessers, the restriction was still reasonable in time.

Ashton's authority is unpersuasive. In Big Top Stores, Inc. v. Ardsley Toy Shoppe Ltd., 84 Misc.2d 894, 315 N.Y.S.2d 897 (Sup. Ct. West. Co. 1970), the referee held, in connection with a presumptively illegal tying arrangement, that the burden of justification was on plaintiff. At bar, defendants do not contend that the limited restriction to be presumptively illegal.

In Larido Corp. v. Crusader Manufacturing Co., 4 Misc.2d 231, 155 N.Y.S.2d 715 (Sup. Ct. N.Y. Co. 1956), plaintiff purchased 100,000 bonnets from defendant, which agreed not to manufacture such bonnets for any other purchaser anywhere for three years. The market for the bonnets was "fast moving" and far less than three years was required for disposal of the 100,000; plaintiff was not obligated to make further purchases from defendnat. The Court found the restriction imposed undue hardship.

In Service Systems, supra, the Court held a non-competition provision enforceable, noting the risk, absent enforcement, of diversion of customers by the employee. At bar, the Dessers sought to protect against a diversion of but a single opportunity.

The validity of Paramount Pad Co. v. Baumrind, 4 N.Y.2d 393, 1975 N.Y.S.2d 809 (1958), is to be doubted in light of Karpinski, supra, Bradford v. New York Times, 501 F.2d 51 (2nd Cir. 1974)* and Gelder Medical Group v. Webber, _____ N.Y.2d ____ (N.Y.L.J. 5/19/77).

Throughout the relevant period plaintiffs were entitled to protect their discovery of Transign and the legitimate expectation that Ashton would not deal with the company in a manner depriving the Dessers of the benefits of the introduction and of a potential participatory interest. Plaintiffs protected this expectation solely by restricting Ashton, in limited manner, in his deal-

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* Bradford has had its fair share of progeny. See e.g., USAmchem, Inc. v. Goldstein, 512 F.2d 163 (2nd Cir. 1975). Bradford, inter alia, noted that under Karpinski a restrictive covenant can be enforced to the extent valid, invalid provisions being severable.

ings with this one company. None of the cases cited by defendants remotely suggests that such de minimus restriction runs afoul of G.B.L. § 340.

IV

(IN SUPPORT OF PLAINTIFFS' CROSS-APPEAL)
THE COURT ERRED IN DISMISSING THE FIRST AND FOURTH CAUSES OF ACTION.

A. The First Cause Of Action

Defendants claim the testimony below was that all negotiations were preliminary and looked toward execution "of a written document as the embodiment of a binding agreement" (Br. p. 63). The Record citations allegedly supporting this statement in fact prove the agreement was intended to be binding without a writing.

Defendants offer no record proof that Ashton's intention was not fraudulent. Rather, his conduct immediately after June 20 reveals that Ashton never intended to honor his agreement and he set about promptly to deal the Dessers out by persuading Youngblood that he had been deceived and by creating a squabble in Youngblood's presence. (See, Ptf. Br. p. 15 et seq.)

The dismissal of the first cause of action was based upon clearly erroneous findings of fact and should be reversed.

B. The Fourth Cause Of Action

Youngblood states his private interest in selling Transign justified his inducing a breach of the June 20 Agreement. The sole authority relied upon is Benton v. Kennedy-Van Suan Mfg. & Eng. Corporation, 2 A.D.2d 27, 152 N.Y.S.2d 955 (1st Dept. 1956). Benton does not detail that type of self-interest which "may be the legal justification which negatives intent to injure" (152 N.Y.S.2d at 958;

emphasis added). The more recent cases cited in plaintiffs' main submission (p. 44 et seq.) indicate that no justification was present at bar.*

Youngblood should have been held liable for inducing Ashton, without justification, to breach the June 20 Agreement.

CONCLUSION

The judgment below should be modified, by reversing the dismissal of plaintiffs' first cause of action as against Ashton and fourth cause of action as against Youngblood; in all other respects the judgment should be affirmed.

Respectfully submitted,

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* The notion the Dessers were unable to find financing and that the Trans-Industries acquisition was the only sale available to Youngblood are discussed in the Reply Statement of Facts, supra.

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